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No. 00-1214

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR PETITIONER

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31 pp

QUESTION PRESENTED

In the light of the "actual imprisonment" standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), refined in *Scott v. Illinois*, 440 U.S. 367 (1979), and reaffirmed in *Nichols v. United States*, 511 U.S. 738 (1994), does the imposition of a suspended or probationary sentence in a misdemeanor case invoke a defendant's Sixth Amendment right to appointed counsel?

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OPINIONS BELOW

The decision of the Alabama Court of Criminal Appeals can be found at *Shelton v. State*, CR-97-1313, 1999 WL 339284 (Ala. Crim. App. May 28, 1999). App. 8–25. The decision of the Alabama Supreme Court is found at *Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000). App. 31–40.

STATEMENT OF JURISDICTION

The decision of the Alabama Supreme Court vacating Shelton's suspended misdemeanor sentence was entered on May 19, 2000. An application for rehearing was denied on October 27, 2000. App. 42–45. The State invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This case arises from the decision of the Alabama Supreme Court to vacate the suspended sentence imposed following LeReed Shelton's conviction for third degree misdemeanor assault based on its conclusion that the receipt of the probationary sentence invoked a Sixth Amendment right to appointed counsel.

On March 21, 1997, LeReed Shelton (Shelton) was adjudged guilty of third degree assault, a misdemeanor offense, then ordered to pay a $500 fine, court costs, and restitution of $333.75, after representing himself in the Etowah County District Court of Alabama. Clerk's Record 2, 12. Shelton appealed the conviction by seeking a trial de novo[1] before a jury in the Etowah County Circuit Court. He then appeared pro se in the circuit court proceedings, where a jury convicted him of the same

[1] Alabama provides a right of appeal from a final judgment of the district court for a trial de novo in the circuit court. Ala. Code § 12-12-71 (1995).

crime. Clerk's Record 2, 12, 15. The trial judge sentenced Shelton to serve thirty days in the Etowah County Detention Center, then suspended the term of imprisonment, imposing two years' unsupervised probation, conditioned on, among other terms, Shelton's payment of court costs, a $500 fine, reparations of $25, and $51.69 in restitution within thirty days. Clerk's Record 16.

Among other issues raised on direct appeal to the Alabama Court of Criminal Appeals, Shelton, through newly retained counsel, asserted that his conviction was void because the trial court had not offered to appoint an attorney for him if he could not afford counsel, and that he had not waived his right to appointed counsel. On October 2, 1998, the Alabama Court of Criminal Appeals declared that "[t]he constitutional right to counsel applies in misdemeanor cases where the appellant's sentence of imprisonment is suspended conditionally" and "remand[ed] the case for the circuit court to determine whether [Shelton] made a knowing, intelligent, and voluntary waiver of his right to counsel." App. 6–7.

On remand, the trial court conducted two hearings, taking evidence from the deputy district attorney, as well as Shelton and his newly retained counsel. Trial Record on Return to Remand 3–46. Following consideration of the arguments and evidence, the judge entered three findings: 1) although Shelton did not explicitly waive his right to counsel, Shelton "understood his right to employ counsel" and "did a credible job of defending his own case"; 2) he cautioned Shelton "[r]epeatedly during the trial" concerning the problems associated with self-representation; and 3) Shelton was "fully aware" of the court proceedings and the implications of trial and imposition of punishment. Clerk's Record on Return to Remand 10–11.

After resubmission of the case, the Alabama Court of Criminal Appeals reversed its previous decision and concluded that a misdemeanor defendant was not constitutionally entitled to appointed counsel upon receipt of a suspended sentence. App. 9–14. In particular, the court reviewed Alabama courts' earlier interpretations of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), and expressly "overrule[d]" certain Alabama cases that "held that [a] conditionally suspended sentence of imprisonment could not be imposed on an indigent defendant who had been denied counsel." App. 10–13.

Accordingly, the court held that "[t]he trial court did not err when it did not conduct an inquiry to determine Shelton's indigence and, had it found Shelton indigent, to advise him of the right to appointed counsel or to determine whether Shelton was affirmatively waiving such a right." App. 14. Nevertheless, the court remanded the case to "ensure that Shelton was afforded allocution." App. 21–23, 25.

While on remand, "in an abundance of caution," the Etowah County Circuit Court "reopened the sentence hearing to allow [Shelton] further allocution[.]" App. 26. At the conclusion of the proceeding, the trial judge imposed the same sentence involving the payment of fines and the suspension of Shelton's thirty-day jail sentence. App. 26. On the second return to remand, the Alabama Court of Criminal Appeals affirmed the sentence imposed by the lower court. App. 28–29. Shelton, through retained counsel, filed an application for rehearing, which was denied on September 24, 1999. App. 30.

Shelton then filed a petition for writ of certiorari in the Alabama Supreme Court, which was granted on

December 13, 1999. In a 6-to-1 decision,[2] the court affirmed Shelton's misdemeanor conviction and "[t]he remaining aspects of the sentence[,]" but "revers[ed] that aspect of his sentence imposing 30 days of suspended jail time." App. 40. The court observed that "[o]n cross-examination, Shelton stated that he was aware he could be represented by counsel if he 'went and paid the money' to hire a lawyer." App. 32. However, the court concluded that "[t]he record does not contain evidence that anyone told Shelton that the trial court would appoint a lawyer to represent him if he could not afford one." App. 32.

The Supreme Court of Alabama then examined this Court's decisions in *Argersinger* and *Scott*. The court below acknowledged that the *Argersinger* Court held that the Sixth Amendment right to appointed counsel turned on "the actual deprivation of a person's liberty," but concluded that this decision "did not address the issue of a defendant's right to counsel when no loss of liberty has occurred." App. 34–35. The Alabama Supreme Court further recognized that *Scott* reconfirmed *Argersinger*'s "central premise," — i.e., "that actual imprisonment is a penalty different in kind from fines of the mere threat of imprisonment," App. 35, but concluded that *Scott* too was not controlling with respect to suspended sentences. App. 36.

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[2] Justice Johnstone wrote the majority opinion vacating Shelton's suspended thirty-day sentence, with Justices Hooper, Houston, Cook, Lyons, and England concurring. Justice Maddox dissented, reasoning that "because [Shelton] received only a suspended sentence and was not incarcerated, [he] [did] not believe that [Shelton], in fact, had a right to counsel." Justice Brown recused because she was a member of the Court of Criminal Appeals when that court reviewed Shelton's case.

Finding that "[n]either *Argersinger* nor *Scott* addressed the issue . . . whether a suspended or probated sentence to imprisonment constitutes a 'term of imprisonment,' " the Alabama Supreme Court considered conflicting federal and state decisions involving the issue. App. 36–37. Relying on the reasoning employed in *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991), the Alabama Supreme Court concluded that a conditional threat of imprisonment imposed in an uncounseled misdemeanor case "could never be carried out" and thus, was "invalid" as a matter of federal constitutional law. Pointing to language in *Scott*, 440 U.S. at 374 (emphasis added), that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment" absent the assistance of counsel, the Alabama Supreme Court ruled Shelton "was entitled to representation by counsel because he was sentenced to a term of imprisonment, albeit suspended." App. 37.

Accordingly, the Alabama Supreme Court held that the Court of Criminal Appeals had "improperly overruled" earlier decisions of that same court "which hold that a conditionally suspended or probated sentence of incarceration cannot be imposed on an indigent defendant who has been denied his right to appointed counsel." App. 38. Ruling "that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel," and discovering no evidence in the record that Shelton " 'was offered counsel[,]' " the court "found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right . . . [and] reverse[d] that aspect of his sentence imposing 30 days of suspended jail time." App. 40. By reversing Shelton's suspended sentence, the court correspondingly vacated the two-year probationary term.

The State filed an application for rehearing in the Alabama Supreme Court asserting that the conditional nature of Shelton's probated sentence did not satisfy the "actual imprisonment" standard of *Scott v. Illinois*, 440 U.S. 367 (1979), and thus that Shelton had no right to State-appointed counsel. The Alabama Supreme Court denied the State's application on October 27, 2000. App. 42.[3]

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[3] The Alabama Supreme Court slightly modified its original opinion on rehearing by including additional commentary in its second footnote.

SUMMARY OF THE ARGUMENT

Although the Sixth Amendment guarantees "the assistance of counsel . . . [i]n all criminal prosecutions," that constitutional protection extends the State's obligation to provide counsel only in those misdemeanor cases involving actual incarceration. This Court established that standard in *Argersinger v. Hamlin*, 407 U.S. 25, 33, 38 (1972), by requiring appointed counsel only where prosecution "actually [led] to imprisonment" or "imprisonment actually occur[red]." This Court has twice refined that principle. First, this Court distinguished between "actual imprisonment" — which invokes the right to appointed counsel — and "fines or the mere threat of imprisonment" in *Scott v. Illinois*, 440 U.S. 367, 373 (1979). Then, in *Nichols v. United States*, 511 U.S. 738, 746 (1994), this Court declared that appointed counsel is needed only where a conviction "result[s] in imprisonment." Shelton, who received a probationary sentence, remained at liberty, subject to a possibility of imprisonment only upon noncompliance with the terms of his release. Because Shelton faced only the "threat" of incarceration, he had no right to appointed counsel during the trial of his misdemeanor case.

Notwithstanding the distinction drawn between "actual imprisonment" and the "mere threat" of incarceration in *Argersinger*, *Scott*, and *Nichols*, the Alabama Supreme Court concluded that imposition of a suspended or probationary sentence in a misdemeanor case triggers the right to counsel. This interpretation contravenes the construction given the Sixth Amendment by this Court in *Scott* and the majority of federal appeals and state supreme courts that have addressed the issue. Accordingly, this Court should reverse and reinstate Shelton's probationary sentence.

ARGUMENT

SHELTON'S RECEIPT OF A SUSPENDED SENTENCE IN HIS MISDEMEANOR CASE WAS A "MERE THREAT OF IMPRISONMENT" UNDER *SCOTT V. ILLINOIS* AND DID NOT INVOKE HIS SIXTH AMENDMENT RIGHT TO APPOINTED COUNSEL.

Under the Sixth Amendment, the right to state-appointed counsel extends only to those cases involving actual incarceration. That conclusion is the product of three decisions. Initially, in *Argersinger v. Hamlin*, 407 U.S. 25, 33, 38 (1972), this Court found that counsel was required only where "imprisonment actually occur[red]." This Court refined that principle in *Scott v. Illinois*, 440 U.S. 367, 373 (1979), by differentiating between "actual imprisonment" and "fines or the mere threat of imprisonment." Finally, this Court affirmed the distinction drawn in *Scott* by recognizing in *Nichols v. United States*, 511 U.S. 738, 746 (1994), that only "criminal proceedings that result[] in imprisonment" invoke the right to counsel. Shelton remained at liberty under his probationary sentence, subject to a possibility of imprisonment only upon violation of the terms of his release. Therefore, because Shelton faced only the "threat" of incarceration, but was not actually imprisoned, he had no right to counsel during the trial of his misdemeanor case.

A. This Court Has Interpreted the Sixth Amendment to Extend Misdemeanor Defendants the Right to Appointed Counsel Only When They Are Actually Imprisoned.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right

. . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. When "originally drafted," this provision accorded only a right to retained counsel in federal criminal proceedings. *Powell v. Alabama*, 287 U.S. 45, 68 (1932) ("Historically [a hearing] . . . has always included the right to the aid of counsel when desired and provided by the party asserting the right."); *Scott*, 440 U.S. at 370 (the Sixth Amendment "contemplated [only] . . . the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense"). Despite the limited original purpose of the Sixth Amendment, this Court extended the right to include appointed counsel for indigent felony defendants. *Powell*, 287 U.S. at 71 (defendants charged in 1931 with capital crime who "stood in deadly peril of their lives" and were "unable to employ counsel" entitled to protection under Sixth Amendment); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (right to appointed counsel for federal felony defendants facing loss of "life or liberty"); *Gideon v. Wainwright*, 372 U.S. 335, 340–45 (1963) (Sixth Amendment right to appointed counsel extended through Fourteenth Amendment to state felony prosecution where defendant faced five years in state prison).

In the application of the Sixth Amendment to misdemeanors, this Court first focused on an individual's "deprivation of liberty" absent the advice and guidance of counsel in *Argersinger*, 407 U.S. at 32–34. Argersinger, charged in Florida with carrying a concealed weapon, faced a punishment of imprisonment up to six months, a $1,000 fine, or both. *Id.* at 26. Following a bench trial, Argersinger was sentenced to serve 90 days in jail. *Id.* Argersinger contested his uncounseled conviction in a state habeas corpus petition, alleging that he was deprived of his right to counsel. *Id.* The Florida Supreme Court denied Argerainger relief, concluding that the right to appointed counsel extended only to trials involving

"non-petty offenses punishable by more than six months imprisonment." *Id.* After granting certiorari, this Court rejected the Florida "six-month" standard and ruled that, because Argersinger "was in fact sentenced to jail," he was entitled to the assistance of appointed counsel. *Id.* at 37.

This Court, however, rejected the broader arguments of Argersinger and the Legal Aid Society of New York, as amicus curiae, that appointment of counsel was required whenever "imprisonment was an authorized penalty." *Scott*, 440 U.S. at 373 n.4. Drawing a bright line, this Court established that the right to appointed counsel applies only where prosecution "actually [led] to imprisonment" or "imprisonment actually occur[red]." *Argersinger*, 407 U.S. at 33, 38.

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.
>
> *The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty*, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy.

Id. at 40 (emphasis added).

Unwilling to "extrapolate" or further "depart[] from the literal meaning of the Sixth Amendment" as construed in *Argersinger*, this Court, seven years later in *Scott*, refused to extend the right to appointed counsel to

cases where imprisonment was an "authorized" penalty for a misdemeanor crime. *Scott*, 440 U.S. at 372. Scott faced a $500 fine, one year in jail, or both, for his Illinois shoplifting crime, but ultimately received only a fine upon conviction. *Id.* at 368. Appealing his uncounseled conviction to the Illinois Supreme Court, Scott contended that this Court's decisions, "culminating in *Argersinger v. Hamlin*[,] . . . require[d] state provision of counsel whenever imprisonment [was] an authorized penalty." *Id.* The state supreme court rejected Scott's argument and refused to extend *Argersinger* to cases where imprisonment was merely an authorized statutory punishment. This Court agreed and held that the Sixth and Fourteenth Amendments "require[d] only that no indigent criminal defendant be sentenced to a term of imprisonment unless . . . afforded . . . the right to assistance of appointed counsel[.]" *Id.* at 374. This Court differentiated between cases resulting in "actual imprisonment" — which required Sixth Amendment protection — from those involving only "fines or the mere threat of imprisonment."

> *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. . . . [T]he central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.

Scott, 440 U.S. at 373.

Fifteen years later, this Court reaffirmed *Scott* in *Nichols* by applying the "actual imprisonment" standard to permit use of an uncounseled misdemeanor conviction to enhance punishment in a later case. *Nichols*, 511 U.S.

at 746–47. In 1983, Nichols was convicted in Georgia for misdemeanor driving under the influence; although he faced a maximum punishment of a one-year imprisonment and a $1,000 fine, the state court imposed only a $250 fine. *Id.* at 740 & n.1. Seven years later, when Nichols pleaded guilty to possession of cocaine with intent to distribute, the United States District Court for the Eastern District of Tennessee relied on the 1983 crime to add a criminal history point to Nichols's total sentencing score under the United States Sentencing Commission's Guidelines. *Id.* at 740. Nichols objected to the use of the misdemeanor conviction for enhancement on the ground that, in violation of the Sixth Amendment, he was not represented by counsel. Both the district court and Sixth Circuit held that Nichols's constitutional rights were not violated by use of the prior conviction. *Id.* at 741–42.

"[A]dher[ing] to *Scott v. Illinois*[,]" this Court held that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, [was] also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748–49. Reviewing the difference between the application of the Sixth Amendment to felonies and misdemeanors,[4] this Court reiterated its earlier conclusion that "the language of the Sixth Amendment . . . had [been] expanded . . . well beyond its obvious meaning" and emphasized that *Scott* drew "the line . . . [for Sixth Amendment protection of misdemeanor defendants] between criminal proceedings that resulted in imprisonment, and those that did not." *Id.* at 746.

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[4] While discussing *Scott*, this Court "contrast[ed]" between misdemeanor and felony cases, noting that, only in the latter did "the Constitution require that an indigent defendant be offered appointed counsel unless that right [was] intelligently and competently waived." *Nichols*, 511 U.S. at 743 n.9.

Consistent with *Scott* and *Nichols*, this Court, in decisions involving the right to counsel for termination of parental rights, has reiterated that the loss of physical liberty triggers Sixth Amendment protections. *Lassiter v. Department of Social Services of Durham Co.*, 452 U.S. 18, 25–26 (1981) ("the defendant's interest in personal freedom . . . triggers the right to appointed counsel"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996) ("In criminal prosecutions that do not lead to the defendant's incarceration . . . our precedent recognizes no right to appointed counsel.").

The Alabama Supreme Court's ruling erroneously expanded this Court's application of the Sixth Amendment in *Argersinger*, *Scott*, and *Nichols*. *Cf.*, *Arkansas v. Sullivan*, 121 S. Ct. 1876, 1878 (2001) ("while 'a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them"). By focusing on language in *Scott* that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment" absent assistance of counsel, 440 U.S. at 374, the Alabama Supreme Court overlooked the demarcation of "actual imprisonment" — judged at the time of final disposition — as the benchmark triggering the right to counsel in *Argersinger*, *Scott* and *Nichols*. In including only those convictions where "imprisonment actually occur[red]" in *Argersinger*, 407 U.S. at 38, and adopting an "actual imprisonment" standard over a "mere threat" of incarceration inquiry in *Scott*, 440 U.S. at 373, this Court limited Sixth Amendment protection to situations where an indigent misdemeanor defendant suffered a physical loss of liberty. Refining *Scott* in *Nichols*, this Court emphasized the right to counsel only extended to "criminal proceedings that

resulted in imprisonment[.]" 511 U.S. at 746 (emphasis added). When considered collectively, and in the context of this Court's expressed aversion to enlargement of the Sixth Amendment in *Scott*, 440 U.S. at 372, these cases mandate appointed counsel only when the indigent misdemeanor defendant is imprisoned for his crime.

The Etowah County Circuit Court exercised its discretionary authority to suspend Shelton's thirty-day jail sentence and released him on probation.[5] Shelton was not "actual[ly] imprison[ed]"; instead, he faced only the "threat" of imprisonment, which did not warrant appointment of counsel. Accordingly, under *Argersinger*, *Scott*, and *Nichols*, Shelton was not entitled to appointed counsel.

B. The Majority of Federal Appeals and State Supreme Courts Have Ruled That a Suspended or Conditional Sentence Does Not Trigger a Misdemeanor Defendant's Right to Appointed Counsel Under the Sixth Amendment.

Before *Scott*'s release, the Fifth Circuit Court of Appeals discerned that the Supreme Court required actual confinement to invoke the protections of counsel in a misdemeanor case. *Cottle v. Wainwright*, 477 F.2d 269, 275 (5th Cir. 1973), *vacated on different grounds*, 414 U.S. 895 (1973). In *Cottle*, the Fifth Circuit affirmed the

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[5] To utilize the tool of probation, Alabama circuit courts must initially suspend a sentence of imprisonment. Excepting convicts "whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years[,] . . . [c]ircuit courts and district courts . . . may suspend execution of [a] sentence and place on probation any person convicted of a crime in any court exercising criminal jurisdiction.." Ala. Code § 15-22-50 (1995).

Florida Parole Commission's use of an uncounseled misdemeanor conviction that had resulted in a twenty-day suspended sentence to revoke parole following commission of a second parole violation. Building on the statements in *Argersinger* that appointed counsel was only required when a misdemeanor conviction "end[ed] up in the actual deprivation of a person's liberty," 407 U.S. at 40, the court upheld the validity of the uncounseled conviction, ruling that a suspended sentence was not tantamount to "actual imprisonment."[6] *Cottle*, 477 F.2d at 275.

The Second, Fourth, Sixth, and Eleventh Circuits agreed with *Cottle*'s rationale that probationary and suspended sentences do not invoke the right to appointed counsel. In *United States v. Castro-Vega*, 945 F.2d 496, 499–500 (2d Cir. 1991), *cert. denied*, 507 U.S. 908 (1993), the Second Circuit held that, because "no Sixth Amendment right to counsel" attached upon receipt of a probationary sentence, an uncounseled conviction could be used to increase the defendant's criminal history level. Similarly, the Fourth Circuit, in *United States v. Jackson*, 605 F.2d 1319, 1320 (4th Cir. 1979), ruled that a probationary sentence imposed for assault was not "actual imprisonment" under *Scott* and did not create a "constitutional right to court-appointed counsel."[7]

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[6] *Cottle*'s validity was called into question in *Potts v. Estelle*, 529 F.2d 450, 453-54 (5th Cir. 1976), where the court interpreted *Argersinger* to preclude subsequent use of uncounseled misdemeanors. After the release of *Scott v. Illinois*, however, the Fifth Circuit revived *Cottle* by ruling that an uncounseled misdemeanor, absent imposition of a jail sentence, was "valid for all purposes" — in that case, for impeachment. *Griffin v. Blackburn*, 594 F.2d 1044, 1045-46 (5th Cir. 1979).

[7] In dicta in a subsequent decision, the Fourth Circuit, while "declin[ing] to decide if the right to counsel attaches when a suspended jail sentence is imposed" noted that, because, upon violation, the probation could not be revoked and an active sentence imposed, "the magistrates in this circuit should not impose even a suspended jail sentence in any case in which an unrepresented defendant has declined to waive his right to counsel." *United States v. Sultani*, 704 F.2d 132, 133-34 (4th Cir. 1983).

Following the same reasoning, the Sixth Circuit in *United States v. Milligan*, No. 96-5330, 96-5439, 1999 WL 313881, at *3 (6th Cir. May 3, 1999) (unpublished opinion), found that a suspended sentence imposed for an uncounseled misdemeanor weapons possession charge was not a "term of imprisonment" under *Scott* and was properly used by a federal district court to assess one criminal history point in calculating the defendant's criminal history category for a subsequent drug conviction. The Eleventh Circuit, in following *Scott* and adopting Fifth Circuit precedent,[8] joined the Second, Fourth, Fifth, and Sixth Circuits in validating uncounseled misdemeanors that result in a suspended or probationary sentence. *United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988) (uncounseled misdemeanor convictions may be used for enhancement "where defendant was not imprisoned").

Relying on the *Scott* differentiation between "actual imprisonment" and the "mere threat" of incarceration, numerous state supreme courts have also reasoned that a suspended or probated sentence does not create a right to assistance of counsel. *Parks v. McClung*, 524 S.E.2d 718, 720 (Ga. 1999) (in discussing the right to revoke probation, the Georgia state supreme court adopted appellate court precedent holding that "[w]here a

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[8] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the United States Court of Appeals for the Eleventh Circuit held that "the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981 . . . shall be binding precedent in the Eleventh Circuit."

defendant is given a conditional, probated sentence, he is not entitled to court-appointed counsel!"); *People v. Reichenbach*, 587 N.W.2d 1, 16 (Mich. 1998) ("The plain meaning of the words 'actual imprisonment' as well as the words 'mere threat of imprisonment' dictate the conclusion that defendant's conditional sentence did not constitute 'actual imprisonment.' "); *Griswold v. Commonwealth*, 472 S.E.2d 789, 791 (Va. 1996) (a thirty-day suspended sentence did not equate to the "actual imprisonment" established in *Scott* and *Nichols* as requiring appointment of counsel); *State v. Hansen*, 903 P.2d 194, 197 (Mont. 1995) ("the imprisonment must be *actual*; a threat of imprisonment (such as a suspended sentence) is not enough to create a constitutional right to counsel") (emphasis in original); *Commonwealth v. Thomas*, 507 A.2d 57, 59 n.7 (Pa. 1986) (co-defendant's probationary sentence, notwithstanding the "threat" of subsequent revocation, did not entitle her to assistance of counsel). Many state appellate courts agree with this interpretation. *Barnes v. State*, No. A01A0624, 2001 WL 540764, at *1 (Ga. Ct. App. May 23, 2001) ("a '12-month probated sentence' . . . and a '12-month suspended period of confinement' . . . were not sentences of actual imprisonment triggering the right to counsel"); *People v. MacArthur*, 731 N.E.2d 883, 886–90 (Ill. App. Ct. 2000) (defendant not entitled to counsel when one-year conditional discharge imposed because "actual imprisonment is a punishment so different in kind from lesser penalties that the constitutional right to counsel protects only against uncounseled convictions that actually result in imprisonment"); *West Valley City v. Sellers*, No. 990472-CA, 1999 WL 33244766, at *1 (Utah Ct. App. Sept. 2, 1999) (suspended sentence imposed for speeding, a class C misdemeanor, did not "deprive[] [defendant] of his liberty" such that he was entitled to appointed counsel); *Holmes v. State*, 740 So. 2d 952, 961 (Miss. Ct. App. 1999) (forty-eight-hour suspended

sentence did not result in incarceration and could be used, under *Nichols*, to enhance punishment in a subsequent case); *State v. Rau*, 465 S.E.2d 370, 387–88 (S.C. Ct. App. 1995) (thirty-day jail sentence, suspended upon payment of a fine, where fine paid, did not create a constitutional right to appointed counsel); *Hlad v. State*, 565 So. 2d 762, 766–67 & n.1 (Fla. Dist. Ct. App. 1990) (interpreting "imprisonment" to entail "confinement in a jail or state penitentiary," defendant's five-year probationary term did not create a right to appointed counsel under *Scott* and could be used to enhance fourth DUI offense from misdemeanor to felony), *aff'd*, 585 So. 2d 928 (Fla. 1991); *City of Akron v. Bilder*, No. 14363, 1990 WL 67055, at *1 (Ohio Ct. App. May 16, 1990) (no attorney was required on resentencing when the original jail term was suspended) (unpublished opinion); *State v. Sweeney*, 464 A.2d 1150, 1151–52 (N.J. Super. Ct. App. Div. 1983) (imposition of one-year probationary term did not create a right to counsel, thus making an uncounseled misdemeanor valid for enhancing the sentence of a second DUI offense); *Campa v. Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) (because revocation of a probationary term is "speculative," and prosecutor and city magistrate agreed no jail time would be imposed, the defendant was not entitled to counsel during trial).

"[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Lassiter*, 452 U.S. at 25. That interest corresponds with the legal implications inherent upon receipt of a conditional sentence. Imprisonment itself involves physical confinement, whereas, a probated or suspended sentence permits emancipation in lieu of incarceration, subject to a threat of imprisonment implemented only if the misdemeanor defendant fails to fulfill the terms of

release. *Black's Law Dictionary* 760, 1220, 1367, 1368 (7th ed. 1999) (defining "imprisonment," "probation," and "conditional" and "suspended" sentences). "Were it the case that probation or conditional sentences constitute 'actual imprisonment' because of the judicial threat of imprisonment, nearly every misdemeanor sentence would be within the scope of 'actual imprisonment.' " *Reichenbach*, 587 N.W.2d at 7. Language in *Argersinger* cautions that "[t]he run of misdemeanors [would] not be affected" under its "actual deprivation" standard. 407 U.S. at 40. This principle, combined with the dismissal of a need for appointed counsel in *Scott* when faced with a "mere threat of imprisonment," and the recognition in *Nichols* that counsel is needed only when a conviction "result[s] in imprisonment," confirms the *Reichenbach* court's conclusion and supports the majority of federal appeals and state supreme courts that agree with this reasoning. *Scott*, 440 U.S. at 373; *Nichols*, 511 U.S. at 746.

C. If the *Scott* "Actual Imprisonment" Standard Was Interpreted to Require Appointment of Counsel When Suspended or Conditional Sentences Were Imposed, it Would Divert Scarce Judicial Resources.

The incremental benefit of providing counsel in situations where only the "threat" of imprisonment exists does not outweigh the strain that would be imposed on scarce governmental and judicial resources. *Argersinger*, 407 U.S. at 49 ("[w]here the possibility of a jail sentence is remote . . . the costs of assistance of counsel may exceed the benefits") (Powell & Rehnquist, JJ., concurring). States and courts would incur additional expenses in compensating defense counsel and supplying additional judicial resources, such as extra courtroom time and court

reporters. Moreover, such a rule would "favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a minor petty-offense case would be a luxury the family could not afford." *Id.* at 50.

Concomitantly, trial courts' abilities to adjudicate "minor" offenses efficiently and equitably would be thwarted by the escalating delay and congestion. *Id.* at 59 (pressures on obtaining counsel and diverting other resources would be "likely to result in the stretching out of the process with consequent increased costs to the public and added delay and congestion in the courts"). Inundated with inevitable "overlawyering" of minor cases, the courts and the public would suffer the unnecessary effects of a "stretching out of the process[.]" *Id.*

Resources would be further exhausted in reviewing innumerable cases where an uncounseled misdemeanor conviction resulting in a suspended or conditional sentence was used, under *Nichols*, to increase the penalty for a subsequent crime. Diverting money and time to resolve misdemeanor offenses and reexamine the use of uncounseled convictions for enhancement purposes would drain local and state courts, thereby depleting the limited judicial resources available to adjudicate felony and especially capital cases. Finally, successful challenges would emasculate anti-recidivism statutes and their underlying policies t[illegible]afeguard the public and deter future crime.

The "actual imprisonment" language employed in *Scott* and *Nichols* "is clear. Nowhere does [this] Court limit its holding to those misdemeanor convictions resulting in fines. Logically speaking, the 'mere threat of imprisonment' can only be read to include suspended sentences." *United States v. Smith*, No. 94-5627, 1995 WL 314892, at *2 (6th Cir. May 23, 1995) (unpublished

opinion). A suspended sentence, under which Shelton did not face a loss of liberty, fell within the "threat" category identified in *Scott*. In such circumstances, Shelton's "interest in personal liberty [was] diminish[ed], [therefore,] so [was] his right to appointed counsel." *Lassiter*, 452 U.S. at 26. The Alabama Supreme Court ignored these principles and erroneously concluded that Shelton's prospect of imprisonment invoked the right to counsel. Because that decision conflicts with this Court's decisions in *Argersinger*, *Scott*, and *Nichols*, and with the decisions of a majority of federal appeals and state supreme courts that have considered this issue, this Court should apply the "actual imprisonment" standard and rule that Shelton's suspended jail term did not invoke the Sixth Amendment right to counsel.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

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